Supreme Court, U.S.
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In The Supreme Court of the United States

NEENA SHARMA,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it violates the due process guarantee of the Fifth Amendment of the U.S. Constitution to deport a mother for appearing less than one hour late for a hearing, because the government's legitimate interests can be accomplished by a lesser sanction.

2. Whether it is manifestly unjust to deport a child's mother for "failure to appear at all" when in fact she only failed to appear at exactly the appointed hour.

LIST OF PARENT COMPANIES

The petitioner is neither a corporation nor a subsidiary of a corporation.

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OPINIONS AND ORDERS BELOW

The January 22, 2003 opinion of the U.S. Court of Appeals for the Ninth Circuit, Pet. App. 1, is unreported. The January 31, 2002 opinion of the Board of Immigration Appeals is also unreported. Pet. App. 3-5. The May 7, 2001 opinion of the Immigration Judge is unreported. Pet. App. 6-8.

BASIS FOR JURISDICTION

The Board of Immigration Appeals dismissed the Petitioner's appeal of an earlier immigration judge's decision on January 31, 2002. Petitioner then filed a Petition for Review in the U.S. Court of Appeals for the Ninth Circuit. That court denied the petition on January 22, 2003.

This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229a(b)(5)(A) provides that an alien who, after being provided written notice of a proceeding, fails to appear at the proceeding, "shall be ordered removed in absentia…"

8 U.S.C. § 1229a(b)(5)(C) provides that the immigration judge may rescind the *in absentia* removal order "if the alien demonstrates that the failure to appear was because of exceptional circumstances…"

8 U.S.C. § 1229a(e) "exceptional circumstances" states:

The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."

STATEMENT OF THE CASE

Ms. Sharma, the Petitioner, is a citizen of India, and the mother of a four-year-old United States citizen child. Because she arrived late for a hearing in Immigration Court, she was ordered deported. Ms. Sharma argues that this sanction is so harsh, disproportionate and excessive that it must be deemed unconstitutional.

A. THE FACTS

Ms. Sharma, a native and citizen of India, entered the United States in 1997, on a six-month visa. She has since overstayed.

She filed an application for asylum, as per 8 U.S.C. § 1158(a), and was given notice of a hearing in Immigration Court on November 29, 2000 at 8:30 am. Opinion of Immigration Judge (IJ") at 2. On that day, at that time, Ms. Sharma was not present, and hence was ordered deported in absentia. Id.

In April 2001, Ms. Sharma filed a Motion to reopen, attaching affidavits, wherein she asserted that she arrived in court less than one hour late. She asserted that she left her home at 6:15 am, for a trip that normally takes one hour. She encountered "exceptionally heavy rain and very strong winds," which caused traffic to move slowly, causing her to arrive at her attorney's office at 9:00 am. Opinion of Board of Immigration Appeals, at 2.

As she was "driving, the rain started falling exceptionally hard and there were very strong winds, hence slowing the morning traffic. ..It was very difficult to see even a small distance ahead as the heavy rain and strong winds made it almost impossible." Affidavit of Mr. Kumar, at 1, attached to the Motion to Re-open. She then walked to the Immigration Court, and found that the courtroom of her Judge was closed and locked. Id.

B. THE DECISIONS BELOW

The Immigration Judge, without mentioning the U.S. Constitution, determined that Ms. Sharma had not demonstrated "exceptional circumstances" for her tardiness. The Board of Immigration Appeals affirmed. The U.S. Court of Appeals for the Ninth Circuit affirmed, stating, "inclement weather and heavy traffic do not constitute exceptional circumstances."

REASONS FOR GRANTING THE WRIT

A. The Court below failed to address whether the Due Process Clause forbids the Government to deport a mother for appearing less than one hour late for a hearing, because the Government's legitimate interests can be accomplished by a lesser sanction.

Ms. Sharma appeared in court, less than one hour late, on a day with severe weather. This admittedly is not an "exceptional circumstance" as defined by the literal words of 8 U.S.C. section 1229a(e).

Ms. Sharma deserves to be punished and sanctioned for her tardiness; however, to construe the above-cited statute to require the sanction of deportation is unconstitutional.

The Government has not demonstrated that its interests could not be accomplished by a lesser sanction.

The statute in question here should be construed to avoid constitutional problems, as was the statute in Zadvydas v. Davis, 121 S. Ct. 2491, 533 U.S. 678 (2001).

In Zadvydas, petitioner was born in Germany, and committed several crimes in the United States. After being convicted of attempted robbery, burglary, theft, and possessing cocaine, he was sentenced to 16 years' imprisonment. He was ordered deported to Germany, but that country would not accept him. The Attorney General then proposed to detain petitioner indefinitely, pursuant to 8 U.S.C. § 1231(a)(6).

The Supreme Court, however, noted that a statute "permitting indefinite detention of an alien would raise a serious constitutional question," perhaps violating the Fifth Amendment's Due Process Clause. Id. At 2498. That Clause forbids the Government to "deprive" any "person... of liberty...without due process of law." The court found that there was "no sufficiently special justification here for indefinite civil detention" articulated by the Government. Id. At 2499. The court noted that the Due Process Clause applies to all "persons" within the United States, "including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Id. At 2500.

Furthermore, aliens "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Id. At 2501. The court then ruled that the statute in question must be construed to contain an implicit "reasonable time" limitation, to avoid constitutional concerns.

The reasoning of Zadvydas should be applied to the case at bar: a statute, which apparently requires the sanction of deportation, for being one hour late, must be construed to avoid serious constitutional concerns.

WHERE THERE IS NO REAL PREJUDICE TO THE GOVERNMENT, RULES MUST BE CONSTRUED TO ACHIEVE JUSTICE

In other contexts, courts have construed rules to achieve justice:

In Stutson v. United States, 516 U.S. 193 (1996), Mr. Stutson was convicted and sentenced on a cocaine charge. His lawyer mailed a notice of appeal so that it arrived one day late for the 10-day deadline, and at the Court of Appeals, when it should have been sent to the District Court. The District Court and the Court of Appeals for the Eleventh Circuit denied Stutson all relief.

The Supreme Court, however, vacated and remanded those decisions, stating that Stutson's "liberty and due process rights" were important, and that "our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that cause no prejudice to the prosecution to preclude a remand under 28 U.S.C. § 2106 (1988 ed.) 'in the interests of justice.'..." Id. at 194.

"But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." (citations and quotations omitted) Id. at 197.

In Stutson, the Court granted relief to a man convicted on cocaine charges. In the case at bar, the futures of a mother and four-year-old child are at stake.

For another example, see Pioneer Investment Services v. Brunswick Associates Limited Partnerships, 507 U.S. 380, 393 (1993), where the Bankruptcy Court set a deadline for creditors to file a proof of claim. Attorney for respondent filed a proof of claim some 20 days late, and argued this was permissible under a Bankruptcy Court rule which allowed late filings due to "excusable neglect." The attorney claimed his neglect was excusable because he was experiencing a "disruption" in his professional life. The lower court denied relief, stating that the late filing was not "due to circumstances which were beyond the control" of the lawyer. The lower court held that deadlines must be enforced, to achieve the goals of certainty and finality in litigation.

The Supreme Court, however, granted relief, stating that while it does not want parties to freely ignore court-ordered deadlines, it is also true that courts must be "equitable, and take into account all the circumstances," such as whether there any prejudice to the opposing party, and whether there was an impact on judicial proceedings. Id.

In Pioneer, an attorney for a creditor in bankruptcy court was granted relief. Ms. Sharma also deserves relief.

THE PUNISHMENT MUST BE PROPORTIONATE TO THE CRIME.

Ms. Sharma is in contempt of court, and deserves some punishment. However, to deport her is to impose a disproportionately severe punishment.

In United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 2031, (1998), the case was summarized in the first paragraph of the decision:

> Respondent Hosep Bajakajian attempted to leave the United States without reporting, as required by federal law, that he was transporting more than $10,000 in currency. Federal law also provides that a person convicted of willfully violating this reporting requirement shall forfeit to the government "any property... involved in such offense." 18 U.S.C. § 982(a)(1). The question in this case is whether forfeiture of the entire $357,144 that respondent failed to declare would violate the excessive Fines Clause of the Eight Amendment. We hold that it would, because full forfeiture of respondent's currency would be grossly disproportionate to the gravity of his offense.

The Court also stated that the "amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." Id. at 2036. If the forfeiture is "grossly disproportional to the gravity of a defendant's offense," it violates the Constitution. Id.

In Bajakajian, there was no fraud, and respondent "caused no loss to the public fisc." Id. at 2038.

In the present case, there is no fraud, and almost no loss to the public fisc. Deportation is grossly disproportional to the offense of being tardy.

In Atkins v. Virginia, 536 U.S. 304 (2002), Mr. Atkins had committed 16 prior felonies for robbery, abduction and maiming. He then abducted a Mr. Nesbitt, and shot him eight times in the thorax, chest, abdomen, arms, and legs, killing him. Two different juries found Atkins guilty of capital murder, and the death penalty was imposed. Mr. Atkins was also "mildly mentally retarded." The court held that imposing the death penalty upon such a defendant was "excessive." The court noted that the "Eighth Amendment succinctly prohibits 'excessive' sanctions…it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." Id. at 343-44.

In Ewing v. California, 2003 U.S. Lexis 1952, ___ U.S.___ (2003), the court, by a 5-4 vote, upheld the constitutionality of California's "three strikes" law, which imposed a prison term of 25 years upon a repeat offender. However, in that case, defendant was a career criminal, and the government asserted its important interests in reducing serious and violent crime, and in promoting public safety. In the case at bar, Ms. Sharma is not a criminal; she is a refugee seeking asylum. Deporting her will not increase public safety.

In Degen v. United States, 517 U.S. 820 (1996), Mr. Degen was indicted for distributing marijuana. The Government also filed a civil forfeiture complaint against Degen, seeking $5.5 million worth of property. Degen fled to Switzerland to avoid the criminal prosecution, but filed an answer to the forfeiture case. The Government then argued that Degen was thereby "disentitled" to contest the civil case, because he fled.

The Court acknowledged that the dignity of the trial court was threatened, and that Degen was causing a waste of time and delay of the Government's objectives. However, the Court noted that a federal court has an array of means to

enforce its orders. "The existence of these alternative means of protecting the Government's interests, however, shows the lack of necessity for the harsh sanction of absolute disentitlement." Id. at 827.
Yes, indignity has been visited upon the court, and the court wants to deter others; "but, disentitlement is too blunt an instrument for advancing [these interests of the Government]." Id.

In United States v. Halper, 490 U.S. 435 (1989), a Mr. Halper was the manager of a laboratory who submitted $585 of false claims to the Government. For this crime, he was sentenced to two years' imprisonment and a $5,000 fine. Then, the Government filed a civil suit seeking $130,000 for the same conduct. $130,000 was 220 times greater than the Government's measurable loss.

A unanimous Supreme Court held that Mr. Halper could not be subjected to the civil suit. The court held that the Double Jeopardy clause is offended when a "small-gauge offender" is subjected "to a sanction overwhelmingly disproportionate to the damages he has caused." Id. at 449.

In BMW of North America, Inc. v. Gore, 517 U.S. 559, 562 (1996), the court held that punitive damage awards in civil cases could be reviewed for proportionality, under the Due Process clause. In that case, BMW Corporation sold a car as new, when it fact it had been repainted. The consumer who bought the car suffered perhaps $4,000 in actual damages. The court held that a two million dollar punitive damage award was excessive.

The court noted that while "strong medicine is required to cure the defendant's disrespect for the law, [t]he sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering

whether less drastic remedies could be expected to achieve that goal." Id. at 584.

In Trop v. Dulles, 356 U.S. 86 (1958), a United States citizen named Trop deserted from the military in time of war, and was sentenced to three years at hard labor. At issue in the case was whether Trop should also suffer the sanction of loss of citizenship, pursuant to a statute. The Supreme Court held that such a statute violated the Eighth Amendment to the Constitution, because it was penal in nature and prescribes a "cruel and unusual" punishment.

The Court found that the penalty was "cruel in its excessiveness," and noted that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. at 125.

The Court also commented upon deportation, recognizing that this sanction had been earlier deemed as not a penalty. The Court stated that "deportation is undoubtedly a harsh sanction that has a severe penal effect," and that the view that deportation is not a penalty "may be highly fictional." Id. at 121.

The Supreme Court has granted relief to man convicted on cocaine charges, a negligent lawyer, a man with $357,000 cash at an airport, a murderer with 16 prior felonies, a false claimant, the BMW Corporation of North America, Inc., and to a deserter in time of war. So too should relief be granted to a child's mother who was late for a hearing.

Ms. Sharma has committed an offense: she was tardy. She is deserving of some sort of sanction or punishment. However, the sanction imposed must be in proportion to her offense. The sanction of deportation is grossly disproportionate to the gravity of her offense.

B. The Court below failed to determine that it is manifestly unjust to deport a child's mother for failing to appear at exactly the appointed hour.

Ms. Sharma was less than one hour late for her court hearing, on a day with heavy rain and slow traffic. She was less tardy that the applicant in Nazarova v. INS, 171 F.3d 478 (7th Cir. 1999). In Nazarova, the applicant, who spoke only Russian, arrived early at the office of her translator, but the translator had not arrived. She waited nearly two hours for the translator to arrive; when he did, they both went to Immigration Court, arriving two hours late. The IJ and the BIA denied all relief; however, the Seventh Circuit reversed, finding that the due process rights of aliens should not be so easily forfeited on the basis of a technicality. "We pause to note with disfavor their [the IJ's and BIA's] refusal to distinguish between a failure to appear at all and a failure to appear at exactly the appointed hour. We question whether this is the sort of 'failure to appear' envisioned by the statute and doubt that Congress intended such a punitive response to a brief and reasonable delay." Id. at 484.

In Nazarova, the applicant was two hours late, and was granted relief. In the case at bar, Ms. Sharma was less than one hour late. She too is worthy of relief.

In the case Jerezano v. INS, 169 F.3d 613 (9th Cir. 1999), the applicant was 20 minutes late. Relief was granted; the court held that it was an abuse of discretion "to treat a slightly late appearance as a nonappearance." Ms. Sharma was late, but she was only slightly late. It is unjust to deport her under these circumstances.

CONCLUSION

Ms. Sharma is in contempt of court, and deserves to be sanctioned. However, to construe the above-cited statute such that only the sanction of deportation can be imposed, is too severe. The statute must be construed to avoid injustice.

Respectfully submitted,

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NEENA SHARMA,
Petitioner, v.
JOHN D. ASHCROFT, Attorney General,
Respondent.

No. 02-70339

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2003 U.S. App. LEXIS 1663

Entered January 13, 2003[1]

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: On Petition for Review of an Order of the Board of Immigration Appeals. INS No. A77-850-780.

DISPOSITION: PETITION FOR REVIEW DENIED.

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[1] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2)

COUNSEL: For NEENA SHARMA, Petitioner: Charles E. Nichol, LAW OFFICE OF CHARLES E. NICHOL, San Francisco, CA. For JOHN ASHCROFT, Respondent: Regional Counsel, Immigration & Naturalization Service, Laguna Niguel, CA. For JOHN ASHCROFT, Respondent: Michelle E. Gorden, Attorney, Department of Justice, Washington, DC. For JOHN ASHCROFT, Respondent: Ronald E. LeFevre, Chief Legal Officer, IMMIGRATION & NATURALIZATION SERVICE, San Francisco, CA.

JUDGES: Before: BEEZER, KLEINFELD and PAEZ, Circuit Judges.

MEMORANDUM[2]

Before: BEEZER, KLEINFELD and PAEZ, Circuit **[*2]** Judges. **Neena Sharma,** a native and citizen of India, petitions for review of the order of the Board of Immigration Appeals ("BIA") affirming an Immigration Judge's ("IJ") denial of her motion to reopen deportation proceedings. We have jurisdiction pursuant to 8 U.S.C. § 1252. We deny the petition.

We review for abuse of discretion the BIA's denial of petitioner's motion to reopen. *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996). We review de novo petitioner's procedural due process claim because it is a purely legal question. *Id.* The BIA properly exercised its discretion by determining that inclement weather and heavy traffic do not constitute exceptional circumstances sufficient to reopen Sharma's deportation case. *See id.* Furthermore, the IJ had

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

previously advised Sharma orally and in writing of the date and time of her hearing, and warned her of deportation for failure to appear. Accordingly, the BIA did not violate Sharma's due process rights by proceeding with a hearing in her absence. *See id.* at 548.

PETITION FOR REVIEW DENIED.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A77 850-780- -San Francisco
Entered: Jan 31, 2002

In re: NEENA SHARMA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Earle A. Sylva, Esquire

ON BEHALF OF SERVICE: James S. Stolley, Jr.
Assistant District Counsel

CHARGE:
Notice; Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]
In the United States in violation of law

APPLICATION: Reopening

In a decision dated May 7,2001; an Immigration Judge denied the respondent's motion to reopen her removal proceedings. The respondent subsequently filed this appeal. The Service has filed a brief in opposition to the appeal. The appeal will be dismissed.

An order of removal issued following proceedings conducted in absentia pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(A), may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because he or she

did not receive proper notice of the hearing or because he or she was in Federal or State custody and failed to appear through no fault of his or her own. Section 240(b)(S)(C) of the Act, 8 U.S.C. § 1229a(b)(5)(C). *See Matter of Grijava,* 21 I&N Dec. 27 (BIA 1995); *Matter of Gonzalez-Lopez~* 20 I&N Dec. 644 (BIA 1993). The term "exceptional circumstances" refers 10 exceptional circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. Section 240(e)(I) of the Act, 8 U.S.C. § 1229a(c)(1). In determining whether exceptional circumstances exist to excuse an alien I s failure to appear, the "totality of circumstances" pertaining to the alien's case must be considered. *Matter of W-F,* 21 I&N Dcc. 503 (BIA 1996).

Following a hearing conducted in absentia on November 29,2000, the Immigration Judge found the respondent subject to removal as charged, determined that she had abandoned all potential applications for relief, and ordered her deported from the United States. *See generally* section 240 of the Act, 8 U.S.C. § 1229a. The issue for consideration is whether the respondent's motion to A77 850780 reopen that was filed before the Immigration Judge on April 3,200] , set forth an adequate basis for rescinding the respondent's deportation order under section 240(b)(5)(C)(1) of the Act (exceptional circumstances).*See Matter of Gonzalez~Lopez, supra.*

In the motion to reopen, the respondent asserted that she did not arrive on time for her 8:30 a.m. hearing because she encountered "exceptionally heavy rain and very strong winds which allegedly caused traffic to move slower than normal en route to the San Francisco Immigration Court from her Vacaville. California, residence. She indicated that she departed her house at approximately 6:15 a.m. for a trip that she alleges normally would have taken her about

all hour. She did not arrive at her attorney office in San Francisco until 9 a.m., and upon learning that her attorney was not in the office, she then walked t(\ the Immigration Court. After she did *not* find her attorney at the Immigration Court, she returned to the attorney IS office and was told her case had been closed. The Immigration Judge denied the 111otion to reopen, finding that the respondent had not established exceptional circumstances sufficient to merit reopening. He stated that "heavy traffic en route to her heating does not rise 10 the level of an 'exceptional circumstance' which is 'compelling' or "beyond [her) control. In addition, the Immigration Judge commented that traffic congestion in the San Francisco Bay Area is not unanticipated and is certainly not unusual.

On appeal, the respondent again alleges that the "unanticipated" storm caused her to fail to appear for her hearing, and that the storm should be regarded as an exceptional circumstance sufficient to excuse her failure to appear. She claim that she listened 10 the weather forecasts the night before, which allegedly predicted only light rain and that she listened to traffic reports on the morning of the hearing that allegedly described traffic conditions as "free flowing"

In Jerezano v. Ins, 169 F .3d 613 (9tk Cir. 1999), the alien presented himself to the Immigration Judge 15 to 20 minutes past his scheduled hearing time while the Immigration Judge was still on the bench. The Immigration Judge declined to reopen the hearing and denied a later motion to reopen. The Court of Appeals for the Ninth Circuit in which this case arises, reversed the. Im1nigration Judge's decision, ordered the motion to reopen to be granted, and held that it was an abuse of discretion for the Immigration Judge "to treat a slightly late appearance us a nonappearance." In *Romani v. INS,* 146 F .3d 737 (9111 Cir. 1998), the Ninth Circuit he1d that the aliens did not

fail to appear when they were present in the building at the correct time, but did not enter the appropriate hearing room because their at1omey's assistant incorrectly informed them that their case already had been called and they already had been ordered deported iJ1 absentia. Final]y, in *Shanna v. INS,89* r .3d 545 (91" Cjr. 1996). the Ninth Circuit held that the respondents had failed to establish exceptional circumstances sufficient to excuse their failure to appear when they arrived at the hearing between 45 minutes to 1 hour late due to "traffic congestion" and difficulty finding parking.

We note that the respondent does not indicate what time she arrived at the Immigration Court, or what efforts she made to locate her attorney, or the appropriate hearing room, after she arrived in the Immigration Court's Building. In addition, the record does not reflect whether she presented herself to the Immigration Judge to make him aware of her presence. Futhermore, we observe that, by the respondent's own admission, she was not at the building until some time after 9 a.m., when A 77 ~~850 780~~ her hearing was scheduled to begin at 8:30 am. Unlike the respondents in *Romani* v. *INS, supra,* the respondent was not in the building at the time of her scheduled hearing (because she says she did not arrive a1 her attorney's office until 9 a.m.), and she has not established that she physically presented herself to the Immigration Judge as in *Je.1"ezano* v. *INS, supra.* Furthermore, we note that the respondent does not address why her motion to reopen was not filed until over 4 months after the hearing date. Therefore upon review, we concur with the Immigration Judge's determination that the respondent has failed to establish that her absence at the scheduled hearing was the result of exceptional] circumstances) as required by section 240(b)(5)(C)(i) of the Act. *See* section 240(e)(1) of-the Act. *See Matter of Sharma, supra, Matter of S-A-,* 2'II&N Dec.

1050 (BIA 1997) ("heavy traffic" does not constitute exceptional circumstances).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

In re:)
Entered: 5- 7- 01)
)
Neena SHARMA)
File Number: A 77-850- 780)
)
Respondent) In Removal Proceedings)
)

Charge: INA § 237(a)(I)(B) -Remained in the United States for a period longer than permitted after admission as a non-immigrant

Application: Motion to Reopen

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On Behalf of the Service:
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DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent, Neena Sharma, is a native and citizen of India.

On July 10,1999, Respondent filed an application for asylum with the Asylum Office of the Immigration and Naturalization Service ("Service"). *See* Exhibit 2. The Service thereafter initiated removal proceedings against Respondent by serving a Notice to Appear ("NT A ") on Respondent on August 18, 1999. *See* Exhibit 1. The NTA alleged, inter alia, that Respondent entered the United States on September 18, 1997, as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed March 18, 1998. The NT A further alleges that Respondent remained in the United States beyond March 18, 1998, without authorization from the Service.

Respondent appeared before the Court for a master calendar hearing on September 2, 1999. At that hearing Respondent acknowledged receipt of the NT A, admitted the charges contained therein, and conceded removability .The Respondent declined to designate a country of removal. The Court designated India should removal become necessary .At the hearing Respondent also indicated her intent to pursue his asylum application. Accordingly, Respondent was served with a notice of hearing, ordering her to return to Court on November 29, 2000, at 8:30 a.m. for an individual hearing to determine the merits of her asylum claim. *See* Notice of Hearing in Removal Proceedings Dated September 2, 1999.

Respondent failed to appear before the Court on November 29,2000. Respondent's counsel provided no explanation for Respondent's absence, and the Court

proceeded *in absentia.* Based on the pleadings, the Court sustained the charge of removability and ordered Respondent removed from the United States to India. In light of Respondent's failure to appear, the Court deemed her application for asylum abandoned.

> On April3, 2001, Respondent moved the Court to reopen these proceedings, contending that her failed to appear was due to inclement weather and heavy traffic beyond her control. The Service opposed Respondent's motion on the grounds that Respondent did not demonstrate that her failure to appear was due to exceptional circumstances beyond her control.

II. Discussion

Pursuant to section 240(b)(5) of the INA, *in absentia* orders of removal may only be rescinded under three circumstances. First, upon a motion to reopen filed within 180 days after the date of the order of deportation, if the respondent demonstrated that her failure to appear was because of exceptional circumstances. Second, upon a motion to reopen filed at any time if the respondent demonstrates that she did not receive proper notice in accordance with the statute. Finally, if the respondent demonstrates that she was in Federal or State custody and failure to appear was through no fault of her own. INA §240(b)(5); 8 C.F.R. §3.23(b)(4)(ii).

In the case at bar, Respondent is asserting that she did not appear at his hearing because of an exceptional circumstance. "Exceptional circumstances" are defined in section 240(e)(1) of the INA as circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less

compelling circumstances beyond the movant's control. Note that the INA does not limit the definition to solely a serious illness or death, as long as the circumstances are "compelling" and "beyond the control" of the movant. An exceptional circumstance is an "unusual" and "unanticipated" circumstance. See In re Shaar, 21 I&N Dec. 541 (BIA 1996).

The Court is not convinced that the circumstances surrounding Respondent's failure to appear are sufficient to excuse her appearance at the hearing. The Court notes that an accident induced traffic dilemma is a reasonable justification for missing a hearing. Unfortunately, "reasonableness" is not the standard the Court uses when determining whether proceedings should be reopened. The fact that Respondent encountered heavy traffic en route to her hearing does not rise to the level of an "exceptional circumstance" which is "compelling" or "beyond his control." Respondent is expected to secure her own transportation and arrive at the hearing on time despite unexceptional obstacles. Heavy traffic is merely an unexceptional obstacle which could have been foreseen with due care. Traffic congestion in the San Francisco Bay Area is not unanticipated and is certainly not unusual.

Moreover, the Ninth Circuit has already held that traffic difficulties do not qualify as exceptional circumstances beyond the control of an alien to justify rescission of deportation entered *in absentia. Sharma* v. *INS,* 89 F.3d 545 (9th Cir. 1996). Therefore the Court must find that the traffic delay described by Respondent does not rise to the level of exceptional circumstances beyond her control.

Accordingly, the following order will be entered

ORDER

IT IS HEREBY ORDERED that Respondent's motion to reopen these proceedings is **DENIED.**

Date: 5/7/01

/s/ Edward R. Kandler
United States Immigration Judge